



Public Procurement and Human Rights: advancing International Labour Standards at International and European Level

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Abstract

In the current global economy shaped by the global supply chain model, linking business and human rights represents a core challenge to advance sustainable development and a transition to a more socially inclusive economic paradigm. In such context, the State acting as buyer purchases goods, works, services in a multi-stakeholder network with the value chain phases dispersed worldwide. The State represents a potential *mega-consumer* purchasing products and services through public procurement operations to carry out its core functions and to provide essential services to its citizens. Government buying comprises a significant proportion of the overall global economy, accounting for 15-20% of the global GDP. Therefore, it represents an opportunity for governments to promote responsible and sustainable business practices among their contractors, advancing SDG 12 on *sustainable production and consumption* and target 12.7 on *Sustainable Public Procurement*. However, like any other consumers, governments procure via global supply chains in which serious human rights abuses, such as labour standards violations, may occur.

The research paper purports to explore spaces of interconnection among public procurement and human rights, through a three-partite research approach - at international, European and national level. The main results are illustrated, starting with an introduction to the main challenges calling for International Law perspective and showing public procurement as opportunity and risk. Insight is, firstly, provided into the international legal perspective; secondly into the EU legal framework; finally at national level selecting Sweden as case study in the EU panorama for advanced Socially Responsible Public Procurement initiatives.

Introduction

In the current global economy, shaped by the global supply chain model, States purchase goods, works, services in a multi-stakeholder context with the value chain phases dispersed in different countries. The State represents a potential *mega-consumer* purchasing products and services through public procurement (PP) operations to carry out its core functions and to provide essential services to its citizens. Government buying comprises a significant proportion of the overall global economy: it accounts for 15-20% of the global GDP and 12% among OECD States, with approximately €1.3 trillion value of commitments under the *WTO General Procurement Agreement*. Given the significant market proportion, PP represents, therefore, an opportunity for governments to promote responsible and sustainable business practices among their contractors. However, like any other consumers, governments procure via global supply chains in which serious human rights abuses may occur.

Human rights refer specifically to universal legal guarantees inherent to all human beings without discrimination, listed within the *UN Bill of Human Rights* including the *UN Declaration on Human Rights* (1948) and the *International Covenant of Civil and Political Rights (ICCPR)*, the *International Covenant on*



Economic, Social and Cultural Rights (ICESCR) and other core human rights conventions. With specific focus on labour rights risks, among the main challenges identified at international and European level, child labour, forced labour, discrimination at work, lack of freedom of association and collective bargaining, addressed by ILO as core labour standards¹ represent fundamental human rights challenges, calling for action and stronger legal protection.

The research paper purports to explore spaces of interconnection between Public Procurement and Human Rights law, evaluating the effectiveness and limitations of PP in advancing human rights and international labour standards, with focus on the main role and responsibility of the *State as buyer* under international and European law. Advancing international labour standards is, indeed, crucial to boost ethical business conduct and *decent work*, one of the main goal of *2030 Agenda for Sustainable Development* and the focus is specifically on SDG 12 and Target 12.7 on *Sustainable Public Procurement*, specifically on *Socially Responsible Public Procurement*.

Exploring the main legal frameworks at international and European level, the attention is on both hard law and soft law initiatives, bridging gaps and building links among business, human rights and public procurement. At the EU level the focus is on *Socially Responsible Public Procurement* practice at national and regional level thanks to the reformed *Public Procurement Directives* package. In the EU panorama, Sweden is chosen as case study and peculiar example of high-performing PP system, frontrunner in promoting social responsibility, innovation and environmental policy goals through the procurement process. Assessing good practices at public and private sector level, the research sheds light on sectors with high exposure to human rights risks and adverse impacts on individuals and communities, focusing on recent scandals occurred in the procurement of med-tech products and surgical instruments industry entailing a complex supply chains with manufacturing mainly in Pakistan, Bangladesh, Malaysia. Human rights abuses and low ILS performance has been reported by NGOs and the attention of the analysis is on exploring initiatives developed in Sweden and assess the level of commitment, showing strengths and challenges.

Research Questions and Methodology

The research is inspired by the fundamental challenge to explore spaces of interconnection among two apparently separate legal fields: Public Procurement and Human Rights law, shaped by distinct primary objectives, principles, regulatory frameworks. To understand in depth the role and responsibility of the State when acting as a *buyer* under international and European law is considered relevant since gaps at regulatory framework level are identified. Adopting an International law approach on PP is considered crucial given the transnational nature of public purchasing shaped by the global supply chain model in the current global economy and in most business activities and relationships, also when the State is the buyer. In the present literature, human rights and PP has received marginal scrutiny under international law perspective, requiring therefore to expand a more traditional administrative law point of view on the subject.

¹ 1998 ILO Declaration on Fundamental Principles and Rights at Work



Moreover, narrowing the focus on labour rights violations as fundamental human rights challenges, the research tries to understand how to advance international labour standards focusing on *Sustainable Public Procurement* and in particular *Socially Responsible Public Procurement*. The need to explore in depth responsibility and roles of the public and private actors involved in the public supply chain and in the PP cycle is evidenced by an increasing number of reported cases of human rights violations along the public supply chain.

To unpack and explore in details the main research lines, a tripartite research approach is adopted, developing a three-levels analysis at International law, European law, national practice level. The structure envisages theoretical and empirical findings, firstly at international level exploring the main regulatory frameworks and legal backgrounds linking human rights and PP, adopting a perspective on human rights law and soft law initiatives. At EU level, the focus is on the main Public Procurement Directives and *Sustainable Public Procurement* initiatives. Finally, insight from practice is provided focusing on Sweden as case study, chosen as frontrunner in advancing SD at policy and procurement level, showing public sector initiatives in the field of SRPP and the private sector level of commitment, with a specific attention on the healthcare sector.



The methodology followed to design the research is based on qualitative analysis, legal and policy research undertaken during a period of *Thesis Abroad Research* project at the *Raoul Wallenberg Institute of Human Rights and Humanitarian Law* (RWI), under supervision of Prof. Radu Mares, Research Director and Head of the *Economic Globalisation and Human Rights* cluster, relying on business & human rights material at the RWI library and on the *International Learning Lab on Public Procurement and Human Rights* dataset developed by the *Danish Institute of Human Rights*. Inspiration has been fostered by interviews with procurement practitioners and experts in the area of responsible business conduct, public and private sector and civil society² representatives. In shaping the theoretical PP background and practical knowledge on procurement cycle management, sources have been collected during an internship at the *International Training Center of ILO*, in the *Public Procurement Cluster* of the *Sustainable Development Programme*. The empirical findings regarding Sweden, chosen as case study, derives from legal research and interviews with PP

² Interviews with *Electronics Watch* specialized in promoting responsible public procurement in the electronics supply chain.



practitioners and business managers, focusing at public sector level on the *National Secretariat of Sustainable Public Procurement* initiatives and at private sector level on *OneMed* multinational corporation experience in the surgical instruments sector.

The Main Results

Challenges calling for International Law Perspective

In the current global economy, public buyers operate in a context shaped by the global supply chain model, characterized by a multi-stakeholder and complex network, with phases - from the raw material collection/extraction, production, manufacturing, distribution, consumption, disposal - dispersed worldwide calling for an international law perspective. An international human rights law lens on the matter is required since the likelihood of human rights risks occurring along the global supply chain and its phases is high.

The term *supply chain* refers to a network between companies and its suppliers to produce and distribute a specific product to the final buyer, including different activities, stakeholders, resources. “*Global*” supply chain reflects the cross-border nature of its organization, which has become a common feature of production, trade, investment in the global economy. Indeed, supply chains produce benefits reducing costs and enhancing competitiveness in the business landscape. In many countries, particularly developing ones, supply chains have created employment and opportunities for socio-economic development and positive impact with 80% of global trade passing through supply chains, contributing to economic growth, job creation, poverty reduction. However, production dynamics and employment relations can have negative implications for working conditions, creating challenges for human rights and decent work. For instance, the collapse of the *Rana Plaza* building in 2013 and factory fires in Pakistan and Bangladesh in 2012 with over 1,500 deaths, requires a call for global action to achieve decent working conditions in global supply chains³. Main labour law and human rights challenges are related to the fact that worldwide still 152 million people are victims of child labour; widespread informal employment persists, with 24.9 million people victims of forced labour and inadequate wages affects 780 million workers, being trapped in poverty⁴. To effectively tackle decent work deficits and prevent human rights violations throughout the supply chain, an holistic approach to enhance sustainability is required. Decent work is, indeed, an important component of *the 2030 Agenda*⁵, contributing to sustainable economic growth and productive employment (SDG 8), building inclusive and sustainable industries (SDG 9), reducing inequalities (SDG10), ensuring sustainable production and consumption (SDG12), strengthening partnerships for sustainable development (SDG17).

Furthermore, complexities and challenges arise from the interlink with the PP cycle management phases which must be taken into account. From a legal standpoint, PP as a procedure entails three main steps along the so-called *procurement cycle*: the planning stage, the procurement process and contract management⁶.

³ ILO, 2019, Labour Standards in global supply chains, how to meet them to become more competitive and sustainable

⁴ UN Global Compact, 2018, Decent Work in Global Supply Chains, Baseline report

⁵ GA.Res.70/1/2015, Transforming our World: the 2030 Agenda for Sustainable Development (Sept. 25, 2015) http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/70/1

⁶ Ortega & O'Brien, 2017, Advancing Respect for Labour Rights Globally through Public Procurement, Politics and Governance,



Firstly, planning includes identifying the goods, works, services to be contracted, defining their technical specifications and establishing award criteria to select the winning bid and the contract performance clauses. The second phase regards tendering and award of the contract, namely evaluating and selecting bids and further monitoring and evaluating the supplier performance. After that the contractor is selected, contractual terms and conditions are drafted, including the specific performance conditions established in the planning phase. Thirdly, entering into the contract administration or management phase, the ultimate objective is securing effective contractual performance⁷.



Public Procurement as Opportunity and Risk:

Exploring spaces of interconnection among PP and human rights, opportunities and risks can be found in reconnecting the two fields under an international law perspective.

Regarding PP as an opportunity, it comprises a significant proportion of the overall global economy, accounting for 15-30% of the global GDP, representing 30% of governments expenditure. Given its ubiquity across all states, its vast scale and market value, PP embodies an enormous opportunity for governments to leverage their purchasing power to promote respect for human rights in the private sector, promoting transition to sustainable production and consumption⁸. As *mega-consumers* and often the dominant purchaser for specific categories of goods and services, governments have a potential in defining buying standards that may stimulate progressive transformation in sourcing and production processes. Therefore, there is an opportunity for governments to shift markets towards sustainable public production, consumption and more inclusive economies achieving SDG 12.7 of *2030 Agenda for Sustainable Development*, acting on PP norms, policies and practices. PP represents a potential high economic leverage for governments to promote responsible business conduct and stimulate more sustainable consumption and production, promoting SDG 12 and in particular target 12.7 specific on *Sustainable Public Procurement*⁹.

However, on the risk side, States - like other consumers - procure via the global supply chains in which serious human rights abuses may occur. With a specific focus on labour rights risks the attention has been on *child labour, forced labour, discrimination at work, lack of freedom of association and collective*

⁷ Trepte, P., 2006, Public Procurement in the EU: A Practitioner's Guide

⁸ Ortega, O Brien, 2019, "Public Procurement and Human Rights: Opportunities, Risks, Dilemmas for the State as Buyer"

⁹ target 12.7, promotes *public procurement practices that are sustainable in accordance with national policies and priorities*, crucial to ensure sustainable production and consumption patterns (SDG 12).



bargaining, addressed by ILO as Core Labour Standards. Pervasive human rights challenges at international and European level, as showed by several labour violations in different sectors, such as the electronics, extractive, food, garment, med-tech industries *among others* involving the State, procuring entities, suppliers, all having roles and responsibilities at different level.

From the State point of view, PP plays an important role in advancing human rights of its citizens, by providing essential services in order to fulfil their own human rights. Nonetheless, the multiple risks and human rights adverse impacts occurring along the global supply chain may inevitably involve public authorities when entering into commercial relationships with the private sector. Indeed, governments have recently been in the spotlight for involvement in human rights violations when procuring goods, works, services via their supply chains, as reported by NGOs, human rights defenders and media. Examples of human rights and labour rights violations in the global supply chain, along the procurement cycle, are several. Cases of child labour have been reported in the electronics and textile¹⁰ sectors since governments often purchase commercial items from manufacturers that source from countries where child labour is prevalent in factories¹¹. Severe violations are accounted in the extractive industry supplying raw materials required by the electronics and other sectors, engaging children as workforce in hazardous working environments. About forced labour, violations are reported in the procurement of plastic gloves by the public health-care sector in Denmark, containing rubber from plantations relying on forced labour¹². Other examples regard the IT supply chains, in cases of systematic exploitation of Chinese students forced to work in electronics factories that produce servers for brands that universities and public offices procure.¹³ Cases of illegal wages and illegal working hours are frequent, forcing workers to operate in harsh conditions for their physical and mental health. Other examples regard unsafe working conditions and exposure to hazardous chemicals¹⁴ or lack of adequate personal protective equipment, such as in the case of surgical instruments manufacturing for healthcare providers procured by Sweden and UK from Bangladesh, Malaysia, Pakistan¹⁵.

1. Public Procurement and Human Rights: the International Legal Perspective

Exploring the international legal framework, the main role and international responsibility of the State are investigated unpacking the legal instruments addressing the link between PP, corporate violations and human rights. First of all, under general human rights law, the States being traditional subjects of international law, are primary recipients of rights and duty-bearers, having a *duty to protect, respect and fulfil human rights* deriving from customary and treaty law rooted in the ICESCR and ICCPR, regional human rights conventions,

¹⁰ For instance in a Bangladeshi factory that produced licensed apparel for U.S. military stores, a third of the workforce were children, *Electronics Watch* 2018

¹¹ U.S. Department of State, Country Reports on Human Rights Practices for 2013: China 78 (2013), available at <http://www.state.gov/documents/organization/220402.pdf>

U.S. Department of Labor, Bureau of International Labor Affairs, List of Goods produced by Child Labor (2013), available at <http://www.dol.gov/ILAB/reports/child-labor/list-of-goods>

¹² Danwatch, <https://www.danwatch.dk/da/artikler/kritisable-arbejdsforhold-bag-gummihandsker-paa-danske-hospitaler/243>

¹³ DanWatch & GoodElectronics, Servants of Servers: Rights Violations and Forced Labour in the Supply Chain of ICT Equipment in European Universities (2015), <https://www.danwatch.dk/en/undersogelse/servants-ofservers/?chapter=1>

¹⁴ in Peru, workers who extract minerals for the electronics industry are exposed to mercury. Verite, 2013, Risk Analysis of Indicators of Forced Labor and Human Trafficking in Illegal Gold Mining in Peru

¹⁵ SwedWatch et. al, Healthier Procurement: Improvements to Working Conditions for Surgical Instrument Manufacture in Pakistan (Apr. 2015), available at <http://www.swedwatch.org/en/reports/healthier-procurement>



such as the *European Convention of Human Rights*. The *state duty to protect* human rights extends to protecting rights-holders within the state's jurisdiction from harmful actions by third parties, whether natural or legal persons, the latter category including corporations and so suppliers to government. Therefore, a *State duty to protect* human rights applies also to business related cases, as pointed out by the recently consolidated *UN Guiding Principles on Business & Human Rights (UNGPs)*, one of the main soft law initiatives developed in the *Business & Human Rights* subfield of international law.

The UNGPs' *Protect, Respect, Remedy Framework* developed by Prof. John Ruggie, shaping the three main distinct but interrelated pillars - *the State Duty to Protect*, the *Corporate Responsibility to Respect*, the *Access to Remedy* - represents a peculiarity which can be applied in linking business, PP and human rights. The UNGPs, being a soft law instrument, do not create new international law obligations, so the State has both negative and positive obligations: negative ones relate to the obligation to respect human rights entailing a direct responsibility of the State for the breach of such duty.

Unpacking the *State Duty to Protect* Pillar I, the UNGPs can be used as main lens to address human rights adverse impacts when the State establishes a commercial *nexus* with the private sector, as in public purchasing activities. It is clear that the State owns a duty to protect HR at business level, having ratified international and regional HR treaties, as the ECHR, however it must be understood to what extent such obligations extend. More specifically UNGP 6 encourages States to promote respect for HR by business enterprises with which they conduct commercial transactions and its Commentary refers specifically to procurement. Unpacking Pillar 1, PP is addressed as one dimension of the *state duty to protect*, encompassing interactions of a commercial nature among the state and business. When the state acts as buyer, a commercial relationship among the private and public sector is established, referred as the *State-business nexus*. *UNGPs 4,5,6* deal with specific state duties involving the State-business nexus, which can be applied to PP circumstances. *UNGP 6* refers, specifically, to state commercial transactions providing that “*States should promote respect for human rights by business enterprises with which they conduct commercial transactions*”. Specific reference to procurement is in the UNGP 6 Commentary: “*States conduct a variety of commercial transactions with business enterprises, not least through their procurement activities. This provides States with unique opportunities to promote awareness of and respect for human rights by those enterprises, including through the terms of contracts, with due regard to States' relevant obligations under national and international law*”.¹⁶ Furthermore, in the “*Elements for the draft legally binding instrument on transnational corporations and other business enterprises with respect to human rights*” (2017)¹⁷, within the negotiation process for a legally binding BHR instrument, it is pointed out under the *Obligation of the States* that “*States shall take all necessary and appropriate measures to ensure that PP contracts are awarded to bidders that are committed to respecting human rights, without records of human rights violations or abuses and that fully comply with all requirements, as established in this instrument*”. This passage shows the awareness of the importance to address PP also from a BHR perspective. A possible ratification of a BHR Treaty, with a new revised draft in 2019¹⁸ by

¹⁶ UNGP 6 Commentary – State commercial transactions with business enterprises

¹⁷ OEIGWG, 2017 https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf

¹⁸ OEIGWG, 2019, https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf



OEIGWG, would mean an important step ahead, clarifying that the State has a duty to set up mandatory measures on human rights due diligence for the business, which involve also PP operations.

The main risk for the State at international law level is the rise of international responsibility, deeply analysed by the 2000 *ILC Draft Articles on State Responsibility* framework. The main dilemma when analyzing the attribution of State responsibility for an international wrongful act- or omission- in PP, is to recognize whether the contractor conduct is attributable to a State, as *de facto* organs (art.4), or to persons/entities exercising elements of governmental authority (art.5). Art.8 can also be recalled on the conduct directed or controlled by a State, when it is proved that it is on the instructions of, or under the direction or control of that State. It is important to clarify and evaluate in which situations the procuring authority and the contractor are responsible for HR violations at supply chain level. As pointed out in Pillar III, it is crucial to ensure effective access to remedy in case of human rights violations, therefore, clarifying the attribution of responsibility is fundamental to outline legal consequences of the legal relationship of responsibility entailing obligation of reparation: “restitution, compensation, satisfaction either singly or in combination”¹⁹.

The State, legally bound to protect human rights related to business, as outlined by the Pillar I and as seen with the attribution of responsibility for international wrongful acts, has an obligation to ensure protection and at the same time respect of human rights under its PP activities. By setting specific requirements in its public purchase along the procurement cycle, for instance in contracts, it may foster responsible business conducts among suppliers in the private sector, influencing a shift towards human rights-based business conduct. However, the main challenges regard gaps at regulatory and hard law level in addressing the link between PP and human rights, although the urgency to act has been evidenced. Soft law initiatives, such as the UNGPs but also the *UN Global Compact*, ILO instruments²⁰ as the *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, are all important tools to raise awareness on the importance to act and are important step ahead, however being not binding, they left open spaces to interpretation. The need for a more consolidated and binding regulatory framework clarifying main roles and responsibilities in PP and human rights represents a fundamental step for future developments.

2. Public Procurement and Human Rights in the EU legal framework

Regarding the interconnection among PP and human rights at the regional level, in the EU context the main PP regulatory framework is based on the revised 2014 *Public Procurement Directives* package. On the human rights side, two systems of human rights protection have developed in EU: firstly, the EU legal framework, with specific provisions on human rights under its founding treaties – TEU, TFEU - and the *Charter on the Fundamental Rights of the European Union* (2000), mentioning human rights protection as EU's overarching objectives. Secondly, the Council of Europe regime of protection has the *European Convention on Human Rights and Fundamental Freedoms* as cornerstone bill of human rights in Europe, with the *European Court of Human Rights* ensuring its enforcement. Further, over the past years commitments to

¹⁹ Art 34 DARS (2001).

²⁰ ILO Conventions, Recommendations and Core Labour Standards and its link with business, exploring the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy



make BHR part of the EU political agenda have been advanced, applying a regional approach to the UNGPs: the 2011 *Communication A Renewed EU Strategy 2011–14 for Corporate Social Responsibility*²¹, the 2015 EU Commission Communication *Trade for All*, the 2015-2019 EU Council *Action Plan on Human Rights Democracy* are few examples, culminating with the recent announcement in April 2020 by the EU Commissioner for Justice of the European Commission’s intention to introduce a mandatory human rights due diligence legislation in 2021.

PP represents a substantial share of the European trade flows (17% EU GDP), with €425 billion (3.4% of EU GDP) regulated under the 2014 *EU Public Procurement Directives* requiring all public buyers to abide for procurement over certain thresholds. Public purchasers are, thus, important market players who can influence commercial behaviour on the basis of their purchasing decisions and expectations set for their suppliers and service providers. The Procurement Directives package (2014) comprises three directives, to be transposed by the MS into their own national legal systems: the *Public Sector Directive* 2014/24/EU²² on rules for public supply, service and works contracts; the *Utilities Directive* 2014/25/EU²³ regulating procurement in the water, energy, transport and postal services sector; the *Concessions Directive* 2014/23/EU²⁴, which creates a new regulated regime for the award of works and services concession contracts over €5 million. Two “Remedies” Directives apply to complaints and review: the *Public Sector Remedies Directive* 2007/66/EC and the *Utilities Sector Remedies Directive* 2009/81/EC²⁵.

Regarding the rationale behind the Procurement Directives reform in 2014, replacing 2004 Directives, next to the objective of increasing the simplicity and flexibility of EU PP law, a major aim was to enlarge the possibilities to pursue environmental, social and economic objectives²⁶. Indeed, the EU Commission has defined PP as a policy strategic instrument to achieve sustainability and as essential contribution to the achievement of EU goal of smart, sustainable and inclusive growth, being a driver to stimulate innovation and resource efficiency²⁷. So, the 2014 Directives present new opportunities for EU MSs to prioritise respect for social, environmental considerations and human rights at the core of their purchasing activities, opening to *Sustainable Public Procurement* (SPP).

Sustainable Public Procurement (SPP)²⁸ is inspired by the notion of sustainable development as “development that allows us to meet our needs today without compromising the ability of future generations to meet theirs”²⁹. The definition adopted by the UN Marrakech Task Force on SPP, refers to: “A process whereby organizations meet their needs for goods, services, works and utilities in a way that achieves value for money on a whole life basis in terms of generating benefits not only to the organization, but also to society

²¹ COM/2011/0681 final, 6, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52011DC0681&from=EN>

²² [Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC on the EUR-lex website](#)

²³ [Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC on the EUR-lex website](#)

²⁴ [Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts on the EUR-lex website](#)

²⁵ [Direktiv 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security](#)

²⁶ Semple, A., 2016, The Link to the subject matter: a glass ceiling for sustainable public contracts?

²⁷ Sjaffel, B., Wiesbrock A., 2016, Sustainable Public Procurement under EU Law: New Perspectives on the State as Stakeholder

²⁸ ICLEI, 2020, <https://sustainable-procurement.org/news?c=search&uid=4sG0E2vA>

²⁹ World Commission on Environment and Development, 1987, Our Common Future, *Brundtland Report*



and the economy, whilst minimising damage to the environment”³⁰. The potential benefits ranges from financial efficiency, to achieving social goals, driving innovation and market transformation, demonstrating political commitment, boosting supply chain competitiveness, meeting environmental goals, reducing GHG emissions can be mentioned, *inter alia*³¹. SPP seeks to “achieve the appropriate balance between the 3 pillars of sustainable development - economic, social and environmental”³², meaning that procurement decisions should be guided by a combination of economic factors (the costs of products and services, etc.), environmental factors (emissions, climate change and biodiversity, etc.) and social factors (social justice, human rights, employment conditions, etc.). Therefore, SPP can be perceived as a means of ensuring that public contracts contribute to broader environmental and social policy goals, either directly in the performance of the contract or indirectly by encouraging companies to change corporate practices.

SPP entails both Green Public Procurement and Socially Responsible Public Procurement: human rights related considerations within the procurement process are part of what is commonly referred to as SRPP, with the aim to set an example and influence the market-place by giving companies incentives to implement socially responsible supply chain and management systems, achieving positive social outcomes in public contracts. In this regard, the EU Commission has developed two soft law instruments to guide and support MSs’ sustainable public purchasing: “*Buying Green- A handbook on green public procurement*” on GPP and “*Buying Social-A Guide to Taking Account of Social Considerations in Public Procurement*” specific on SRPP which has been supported by the recent development of “*Making Socially Responsible Public Procurement Work: Good Practice Cases*”.

Focusing on the 2014 Public Sector Directive, it draws links directly to SD in its recitals and provisions³³, showing flexibility to integrate environmental and social criteria, with reference to the “horizontal clause” - also known as “general social clause” under art.18(2), life-cycle costing (LCC), innovation for involving SMEs, best-price-quality ratio in the contract award fair trade labels, among others.

Linking PP and human rights considerations, art.18(2) represents the most important novelty from a SPP point of view, stipulating that “*MS shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X*”. Annex X references several environmental conventions and the 8 ILO Core Conventions³⁴. These give effect to the Core Labour Standards, concerning freedom of association and collective bargaining, forced labour, child labour, workplace discrimination, reflected in the 1998 *ILO Declaration on Fundamental Principles of Rights at Work*, which arguably have universal application to business enterprises. As recalled in recital 37 of the preamble, it is crucial that MS and contracting authorities take relevant measures to ensure compliance with applicable environmental, social and labour law in order to ensure the appropriate integration of such requirements into PP procedures. Differently

³⁰ UNEP, 2017, Global Review of Sustainable Public Procurement 2017

³¹ Graells, S. A., 2018, Procurement and ‘Core’ Human Rights: A Sketch of the EU Legal Framework, University of Bristol Law

³² UNEP, 2019, Sustainable Consumption and Production Branch, www.unep.fr/scp/procurement/whatisspp

³³ Recitals 2, 41, 47, 91, 93, 95, 96, 123 and Arts. 2(22), 18(2), 42(3)(a), 43, 62, 68, 70

³⁴ ILO Conventions 87, 98, 29, 105, 138, 111, 100, 182



from Directive 2004/18 where reference to social requirements was scarce and confined to the contract performance stage, art 18(2) is legally binding for the MS, providing for compliance with minimum social standards at several stages of PP, as suggested by recital 40. The recital, indeed, states that control of the observance of environmental, social and labour law provisions should be performed at all the relevant stages of the procurement cycle, from planning, to evaluation, award of contracts, when applying exclusion criteria or abnormally low tenders criteria, etc. Despite the legally binding nature of the provision, nonetheless it does not impose any direct obligation upon contracting authorities. The effective enforcement depends essentially on the willingness and discretion of the MS to ensure its actual application and compliance, leaving some questions open to interpretation³⁵.

3. Insight from Practice: Public Procurement and Human Rights Initiatives in Sweden

Assessing the level of commitment to SPP at country level, Sweden is selected as case study in the EU panorama, as frontrunner in SRPP initiatives, characterized by an advanced PP regulatory framework integrating environmental, social and labour considerations, promoting innovation, environmental policy goals and social criteria throughout the procurement process. Initiatives in SRPP with focus on HR and labour rights considerations along the supply chain have been launched at the national, regional and local level, as promoted by art.18(2) of the Directive 24/2004/EU, implemented with chapter 17.1 of the *Public Procurement Act*.

PP plays a significant role in Sweden's economy disbursing an estimated EUR 68 billion annually, corresponding to approximately a fifth of GDP and it is characterized by a decentralized PP system entailing levels corresponding to the three democratic levels of government- the governmental, regional and local ones. The relevant PP regulatory framework is primarily based on the *EU Public Procurement Directives* (2014)³⁶, implemented by the 2016 *Public Procurement Act (LOU)*³⁷, the *Utilities Procurement Act* and the *Concessions Procurement Act*. Regarding procurement of services, Sweden has a unique framework under the *Act on System of Choice in the Public Sector (LOV)*.

At national level, initiatives to include social and environmental considerations within the PP cycle have been advanced by the *National Agency for Public Procurement* developing the 2016 *National Strategy on Public Procurement*, clarifying public buyers' expectations and referring expressly to *environmentally responsible public procurement*³⁸ as one of the main objectives that procuring entities are recommended to pursue. Regarding HR, the Strategy refers in the "7th objective" to *socially responsible public procurement* focusing on social criteria, building on the UNGPs and SDGs frameworks.

Awareness on human rights abuses along the global supply chain of goods, services, works purchased by procuring entities have increased since 2007, emphasized by international and regional initiatives such as the European 2020 Strategy, the UNGPs and the UN SDGs. Cases have been reported by the NGO *Swedwatch*

³⁵ Wiesbrock, A., 2016, Socially responsible public procurement: European value or national choice?

³⁶ Directive 2014/24/EU; Directive 2014/25/EU ; Directive 2014/23/EU; Directive 2009/81/EC

³⁷ The Swedish transposition of the new PP Directive (Dir. 2014/24/EU) was adopted by the Parliament at the end of November 2016 and the resulting law, the PP Act (Lagen om offentlig upphandling) LOU came into effect on 1 January 2017

³⁸ The "6th objective", calling for increased green public procurement, using purchasing as strategic means to achieve environmental goals, setting also animal welfare criteria.



and by the media on labour conditions and abuses in factories involved in the production of products purchased by the Swedish public authorities, *inter alia* in the healthcare sector and the med-tech industry, especially in the procurement of surgical instruments with manufacturing delocated in Pakistan, Malaysia, Bangladesh, Thailand. Violations have also been reported in the electronics and the food sector, linked to the poultry industry in Thailand and coffee production in Brazil³⁹.

Focusing on the healthcare sector, at regional level, Sweden envisages 21 Counties Councils responsible for public healthcare, medical services like dental care and public transportation, procuring for approximately EUR 13 billion per year. Healthcare spending, one of the largest items within procurement expenditure, accounts for approximately 9% of GDPs among OECD countries and in the Swedish county councils purchases it accounts for 80% of the regions' procurement. The 21 Swedish county councils started to focus on SRPP in more comprehensive way since 2007, and since 2012 under coordination of the *National Secretariat for Sustainable Development*⁴⁰, especially after that Swedwatch reported instances of severe labour conditions within the surgical instrument industry in Pakistan, particularly in Punjab region and in the Sialkot cluster. Pakistan, is a major exporter of high-quality surgical instruments - with global market for surgical equipment estimated for €4.4 billion, growing significantly every year - produced in the industrial district of Sialkot procured by public and private health authorities from EU and US. In 2007, for the first time the working conditions situation in Pakistan linked to PP supply chains were brought to the public-eye by a *SwedWatch* report⁴¹, shedding light on exposed hazardous working environments, widespread use of child labour, several labour standard violations including poor remuneration and unfair contractual obligations lack of health and safety measures, violations of local labour laws with regard to minimum wage and excessive overtime, and anti-union policies and practices⁴².

In reaction to the scandals, initiatives on SRPP have been launched by the Swedish Regions, later developed into a national collaboration coordinated by the *National Secretariat on Sustainable Public Procurement*. A pilot project, “*Sustainable Public Procurement- A collaboration between Swedish Regions*”⁴³ has started in 2007 under initiative of the chief procurement officers of *Stockholm County Council, the region of Västmanland and the region of Skåne*. In 2007, there were few legal or policy requirements in Sweden imposing hr considerations and social criteria in PP, whereas environmental requirements in contracts started to be included by county councils since 2001. The contours of the project were influenced by private sector *corporate social responsibility* measures⁴⁴ and initiatives such as the UN Global Compact, ISO 26000 and the OECD Guidelines for Multinational Enterprises. Further influence has derived from the *EU Directive on Public Procurement Reform, Agenda 2030* and national goals and legislation to achieve SDG 12 on *Responsible Consumption and Production* and especially target 12.7 on *SPP*. Particularly the UNGPs (2011) have influenced the project development, requiring suppliers to the Swedish regions to set procedures for

³⁹ Swedwatch 2016, https://swedwatch.org/wp-content/uploads/2016/11/82_Agents-for-Change-enkelsidor.pdf

⁴⁰ Sustainable Public Procurement: A collaboration between the Swedish regions and county councils, National Secretariat Sustainable Public Procurement, <http://www.xn--hllbarupphandling-8qb.se/hallbar-upphandling>

⁴¹ The Dark Side of Healthcare, 2007: https://swedwatch.org/wp-content/uploads/2007/03/vita_rockar_vassa_saxar.pdf

⁴² Gothberg, P. 2019, “Public Procurement and human rights in the healthcare sector: the county councils' collaborative model”

⁴³ Socialt Ansvarstagande i Offentlig Upphandling – Ett samarbete mellan Sveriges landsting och regioner)

⁴⁴ in particular supply chain controls introduced by the brands H&M, Indiska and IKEA. Gothberg, P. 2019



identifying and mitigating risks associated with human rights, workers' rights, the environment and corruption, in their own operations as well as throughout the entire supply chain.

The county councils have identified 8 prioritized risk areas due to high procurement volumes and associated risks of adverse human rights and environmental impacts, requiring a sustainability approach in the procurement management: surgical instruments, surgical gloves, food, ITC, med-tech products, textiles, pharmaceuticals, dressings. In order to identify, map and assess risks in the most efficient way, the risk areas and product category have been divided between eight regions, responsible for developing a 3-year risk-based *action plan* on the product category, made publicly available for suppliers. Each region is further responsible for its follow-ups, stakeholder dialogues, development of new criteria/tools, etc.⁴⁵

One of the most innovative aspect of the collaborative model is the adoption by all county councils and regions of a *Shared Code of Conduct for Suppliers* set up in 2010 and updated in 2019, in order to harmonize and standardize human rights requirements to suppliers within the PP cycle and to be applied when procuring products within one of the targeted high risk sectors. The CoC is structured following the Global Compact's ten principles, divided into four main areas: *human rights, labor law, the environment and anti-corruption*. Its requirements are to be included in the contractual terms established with all county council contractors, which are required to take measures to prevent and manage any human rights violations and the measures must be documented and applied continuously throughout the contract period in the company's own operations and with subcontractors at all levels. The Code refers explicitly to international human rights and labour rights obligations, setting contractual terms which harmonize and clarify the region's expectations of suppliers regarding sustainable supply chains. In details, the contractual terms require to perform the contract in accordance with: *the UN UDHR (1948), the ILO's eight core conventions on forced labor, child labor, discrimination and freedom of association; the UN Convention on the Rights of the Child, Article 32; the occupational health and safety and health and safety legislation in force in the country of manufacture; the labor law, including rules on pay conditions, and the social insurance coverage that applies in the country of manufacture; the environmental protection legislation in force in the country of manufacture; UN Convention against Corruption*.

Taking the business perspective with insight into practice, the level of commitment at corporate level and the CoC strengths and weaknesses has been assessed at private sector level, looking at *OneMed* experience-multinational corporation in the med-tech and surgical instruments distribution sector⁴⁶, headquartered in Sweden, with subsidiaries and suppliers dispersed worldwide. Most of *OneMed* surgical instruments and plastic gloves manufacturing (90%) happen in East Asia through suppliers of the corporation and their subcontractors, entailing complex supply chains, involving many different players in various countries. Social risks not always are visible at supplier level but can occur further down the supply chain, beyond the first-tier of suppliers. A crucial aim is to ensure transparency, visibility and extending risk assessments to cover earlier stages of production including the obtainment and processing of raw materials. The risk assessment procedure

⁴⁵ Loaneus, K., 2018, Sustainable Public Procurement, *Hållbar Upphandling*, <https://www.pianoo.nl/sites/default/files/media/documents/Presentatie-KarinLoaneus-Werkconferentie-ISV-27november2018.pdf>

⁴⁶ as confirmed by the *Business Area & Sourcing Director of OneMed*, Mr. Julien Rolland



of OneMed envisages a risk assessment procedure based on a cross-cutting assessment of the country of origin risks and commodity risks.⁴⁷

OneMed adopted a *Code of Conduct for Suppliers* in 2012 on the basis of the collaborative model and shared Code of Conduct of the county councils and regions. OneMed *Sustainable Supply Chain Management - Code of Conduct*⁴⁸ is based on internationally recognized standards, conventions and declarations (ILO Core Conventions, the UN Universal Declaration of Human Rights, the UN Global Compact). It promotes decent work and environmental standards in the supply chain, cooperating closely with suppliers and business partners. It establishes standards to ensure that working conditions in OneMed's supply chain are safe, that workers are treated with respect and dignity and that business operations are environmentally responsible and conducted ethically. It applies to all OneMed suppliers and their subsidiaries, affiliates and subcontractors supplying goods or services to OneMed. Since social responsibility principles apply throughout the whole supply chain and entire life-cycle of products and services, the responsibility to adhere to the CoC is extended to all sub-suppliers and subcontractors of the suppliers

OneMed experience has showed that adopting CoC for its suppliers, as requirement in the contract by the county council procurement authorities has been effective in leading to a more comprehensive CoC focused on human rights concerns. It has played a role in raising awareness on the importance of hr risks along all the supply chain, especially detecting the situation in informal workshops that are linked to the procured good or service. OneMed has increased awareness through third-party audits (desktop and factory audits), outlining the importance of monitoring compliance. PP requiring social standards is therefore a crucial leverage for human rights advancement in PP, however, it is fundamental that public authorities settle down monitoring compliance mechanisms that are effective, so that such requirements do not remain only on the paper, limited to a mere tick-box exercise. Therefore, willingness from both sides – the State and the Business community – is needed to advance human rights through public procurement while purchasing.⁴⁹ Finally, initiatives like the one of the Swedish regions and county councils represent a step ahead in the advancement of human rights in business when the State is the buyer, or *mega-consumer*, having a potential influence in shaping corporate behaviour towards a more ethical and sustainable responsibility. The Code of Conduct represents a possible tool to inspire transformative action towards more ethical procurement and business, as inspiring OneMed CoC for Suppliers. However, the main challenges outlined by the National Secretariat for Sustainable Public Procurement and OneMed representatives are the lack of resources, commitment and willingness to introduce and control effectively hr standards. More collaboration between the State under the contracting authorities, auditors and the private sector is crucial. The path towards more interconnection among HR and PP is long but evolving, as showed by development process of the county council collaboration which has started from media and NGOs reporting and the development of a common code of conduct for three regions, expanding to a

⁴⁷ OneMed Group, <https://www.onemed.com/>, OneMed Sverige <https://www.onemed.se/>

⁴⁸ OneMed Group, March 2019, Sustainable Supply Chain Management – CODE OF CONDUCT OneMed Group

⁴⁹ Interview conducted with Mr. Julien Rolland *Business Area & Sourcing Director of OneMed Sweden*, Malmö headquarter September 2020



national collaboration, including (since 2014) hr considerations and anti-corruption and then in 2016 increasing resources and commitment focusing on UNGPs and increased follow-ups.

Conclusion

A fundamental dilemma enshrining from the distinction between Public Procurement and Human Rights fields of study with different priorities has inspired the entire work. Indeed, PP primary objectives are traditionally *value for money*, efficiency, non-discrimination, open competition. Nonetheless, governments have often used public purchasing not only as a market-based tool but also as policy instrument to reach economic, social inclusion and environmental goals. The focus of the research has been on exploring spaces of interconnection among the two disciplines under international and the European legal perspectives, to understand the complexities of the role and responsibility of the State when acting as a *buyer* and establishing a *commercial nexus* with the private sector. By applying a human rights law perspective and the UNGPs, the *State duty to protect* human rights when risks occur along the global supply chain has been detected, focusing on fundamental labour rights challenges.

An increasingly globalized economy requires to raise awareness on risks and responsibility at international level. Given the significant market proportion, PP represents an enormous opportunity for governments to promote responsible and sustainable practices in the private sector, as showed by *Sustainable Public Procurement* and *Socially Responsible Public Procurement* practices in the EU context. Sweden has been chosen as case study being a frontrunner country in EU in advancing *sustainable development* at policy and procurement level. Indeed, Public Procurement when properly used with a *human right based approach*, introducing social criteria and labour considerations in the PP cycle may be a useful policy tool to advance international labour standards. As practically showed by the *collaborative model* developed by the Swedish County Councils and the Regions for “high risk” sectors, as the surgical instruments one, it is crucial to establish systematic monitoring compliance mechanisms with integrated audit and follow-ups.

Finally, the *2030 Agenda for Sustainable Development* plays a role in linking public procurement and human rights: target 12.7, promotes *public procurement practices that are sustainable in accordance with national policies and priorities*, crucial to ensure sustainable production and consumption patterns (SDG 12). Human rights, business and public procurement interrelations are dynamic and in constant evolution, with possible future influences deriving from the ongoing negotiation process of a *UN Business & Human Rights Treaty*. In its draft elements, it is outlined the importance for the State to take measures “*to ensure that public procurement contracts are awarded to bidders that are committed to respecting human rights, without records of human rights violations or abuses and that fully comply with all requirements established in this instrument*”⁵⁰. Additionally, at regional level, the recent announcement in April 2020 of the European Commission’s intention to introduce a mandatory human rights due diligence legislation in 2021 and the New Green Deals initiatives open spaces for future discussion on the topic.

⁵⁰ OHCHR 2017, OEIGWG established by HRC Res. A/HRC/RES/26/9 p. 6